UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

Garden Manor Farms, Inc.

Employer,

and **Case No. 2-RC-22692**

United Food and Commercial Workers Union, Local 342, AFL-CIO

Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Audrey Eveillard, a Hearing Officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Upon the entire record in this proceeding,[1] it is found that:

1. The Hearing Officers' rulings made at the hearing are free from prejudicial error and are hereby affirmed.[2]

2. The parties stipulated and I find that Garden Manor Farms, Inc., herein the Employer, is a New York corporation with its principal place of business located at 355 Food Center Drive, Bronx, NY, and distributes meat products to various entities throughout the tri-state area. Annually, in the course and conduct of its business

[1] A brief filed by the Employer has been carefully considered. Petitioner did not file a brief.
[2] In its post-hearing brief, the Employer raises certain contentions concerning blocking charge determinations. Such issues are dealt with administratively and thus are not discussed in this decision.

operations, the Employer purchases and receives goods and supplies valued in excess of $50,000 at its Bronx facility directly from suppliers located outside the State of New York. Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated and I find that United Food and Commercial Workers Union, Local 342, AFL-CIO, the Petitioner, is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Avalon within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks to represent all full-time and regular part-time butchers, grinders, helpers and packers, employed at the Employer's facility located at 355 Food Center Drive, Bronx, New York, excluding all clerical employees, supervisors and guards as defined by the Act. The Employer does not contest the appropriateness of such a unit. However, it seeks dismissal of the petition because of the existence of a current collective-bargaining agreement ("Agreement") between itself and Local 210, Warehouse and Production Employees Union, AFL-CIO ("Local 210").

After considering the evidence and the arguments presented by the parties, I find that the petition is not barred by the above-described contract. To provide a context for my discussion, I will provide an overview of the Agreement, followed by my analysis.

I. Background

a. Contract at Issue

The Employer presented no witness testimony regarding the creation and execution of the Agreement. Documentary evidence establishes that the Employer and Local 210 entered into the seven-page Agreement on November 17, 2000.[3] A representative of the Employer, Stanley Wilhelm, signed the Agreement on behalf of the Employer on January 11, 2001. On January 10, 2001, Dominick Formisano, an official of that Union, signed the Agreement on behalf of Local 210. The contract is effective from November 17, 2000 for a period of 5 years. Thereafter, the Agreement by it terms automatically renews for annual terms, absent notice by either party to terminate it at least ninety days prior to the expiration date, or renegotiate its terms at least thirty days prior to the expiration date.

The Agreement recognizes Local 210 as the "sole collective bargaining agent for all employees in its employ, excluding executives, supervisors, armed guards, office and clerical employees." Among other things, the Agreement contains a dues check-off provision, determines the length of the workweek, holidays, vacation days and sick days, provides for scheduled wage increases, establishes a grievance arbitration procedure, and provides for employee benefits.

b. The Petition and the Article XX Charge

Following the filing of the petition, Local 210 filed an Article XX charge against the Petitioner with the AFL-CIO.[4] Pursuant to Section 11018.1 of the National Labor Relations Board Representation Casehandling Manual, the Region temporarily

[3] It appears the title of the document is "Agreement."
[4] An Article XX charge occurs when there is a representational (raiding) dispute among affiliates of the AFL-CIO. The procedures associated with this charge are internal to the AFL-CIO.

suspended its processing of the petition in order to permit the use of the settlement provisions of Article XX. Local 210 later withdrew its Article XX charge after signing a Memorandum of Agreement[5] with the Petitioner. The Memorandum of Agreement states, *inter alia*, that:

> 1. Local 210 will disclaim interest in the bargaining unit petitioned for by [Petitioner] in 2-RC-22692 and will withdraw the Article XX charge filed against the [Petioner]. . . .
>
> . . . .
>
> 3. Nothing in this agreement shall prevent Local 210 from representing other individuals employed by [the Employer] not included in the above referenced unit petitioned for by [the Petitioner].

The Employer claims to have no had no direct communication from Local 210 regarding its disclaimed interest prior to the hearing. Local 210 subsequently choose not to intervene at the Board hearing.

II. Analysis

The major objective of the Board's contract bar doctrine is to achieve a balance between the conflicting statutory aims of stability in labor relations and the exercise of worker free choice in selecting a bargaining representative. *Appalachian Shale Products Co*., 121 NLRB 1160, 1161 (1958). In order for a contract to serve as a bar to an election, Board doctrine requires that the agreement (1) be in writing; (2) be signed by the parties prior to the filing of the petition that it would bar; and (3) contain substantial terms and conditions of employment. *Seton Medical Center*, 317 NLRB 87 (1995); *Appalachian Shale Products Inc*., supra. The burden of proving that a contract is a bar is on the party asserting the doctrine. *Roosevelt Memorial Park*, 187 NLRB 517 (1970).

[5] Dated June 12, 2003.

A contract will cease to serve as a bar if the incumbent union makes a clear and unequivocal disclaimer of interest in representing the petitioned-for employees. *American Sunroof Corp.*, 243 NLRB 1128 (1979). In *VFL Technology Corp.*, 332 NLRB No. 159 (2000), the Board found a clear and unequivocal disclaimer of interest by a union after it lost an Article XX proceeding. The Board stated that a union's disclaimer would be effective absent collusion between the parties to avoid the terms of a collective-bargaining agreement. *Id.* (citing *NLRB v. Circle A & W Products Co.*, 647 F.2d 924 (9th Cir. 1981). Additionally, the Board held that because of the adversarial nature of the Article XX procedures, "in no way can utilization of the procedures be considered collusion." *Id.*

In the instant case, I find Local 210's disclaimer of interest to be effective. After the filing of the petition, both unions utilized the AFL-CIO's "no-raid" machinery under Article XX. Unlike *VFL Technology Corp.*, the parties settled before the issuance of a formal decision. However, this distinction is irrelevant as there is no evidence that the settlement resulted from collusion.[6]

It is possible for a union's contemporaneous and subsequent conduct to make an otherwise effective disclaimer insufficient. See *Miratti's Inc*., 132 NLRB 699 (1961). Thus, a disclaimer is ineffective if the union engages in conduct inconsistent with an

[6] Despite this, the Employer argues that Board precedent prevents finding an effective waiver because it permits contractual representatives to disavow their legal responsibilities. To support its position, the Employer cites *East Mfg. Corp.,* 242 NLRB No. 5 (1979), where the Board found an inadequate waiver following the mere dissatisfaction of certain union executive board members with the adequacy of the union's representation. I find *East Mfg. Corp.* to be inapposite, as the circumstances surrounding the Article XX proceedings in the instant case render Local 210's disclaimer effective.

The Employer further argues that *any* disclaimer by Local 210 is ineffective because it occurred after the filing date of the Petition. To this end, the Employer seeks to distinguish *American Sunroof*, supra, because in that case the Board found that the petitioning and the incumbent unions had no contact with each other prior to the date of the disclaimer. However, this argument ignores the Board's findings in *VFL Technology Corp.*, supra.

alleged disclaimer. *McClintock Market*, 244 NLRB 555 (1979). In the instant case, the Employer proffered no witness testimony or evidence to establish an ineffective waiver. Therefore, there is no evidence that Local 210 continued to represent the Employer's employees by processing grievances or otherwise servicing the Agreement. While the Employer argues that it did not have notice of the disclaimer prior to the Board hearing, it does not appear that such notice is necessary so long as there is a valid disclaimer. For the foregoing reasons, I find that the disclaimer of interest by Local 210 removes the Agreement as a bar to processing the instant petition.

I therefore find the petitioned-for unit to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Included: All full-time and regular part-time butchers, grinders, helpers and packers employer by the Employer at its Bronx, New York facility.
>
> Excluded: All other employees, office clerical employees and guards, professional employees and supervisors as defined in the Act.

Direction of Election

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time[7] and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and regulations.[8] Eligible to vote are those in the unit who were employed during the payroll

[7] Pursuant to Section 101.21 of the Board's Statements of Procedure, absent a waiver, an election will normally be scheduled for a date or dates between the 25th and 30th day after the date of this Decision.

[8] Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(1) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules. requires that the Employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

period immediately preceding the date of the Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Employees engaged in any economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less that 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military service of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated eligibility period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[9] Those eligible shall vote on whether or not they desire to be represented for collective bargaining purposes by United Food and Commercial Workers Union, Local 348, AFL-CIO. [10]

---

[9] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, three copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before **August 7, 2003.** No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. In the event the Petitioner notifies me that it does not wish to proceed to an election in the unit found appropriate, the election eligibility list will not be provided to Petitioner.

[10] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary,

Dated at New York, New York
This 31st day of July 2003.

(s) *Celeste J. Mattina*

Celeste J. Mattina
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

Blue Book Code: 347-4030-6700

332-2500

1099 14th Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **August 14, 2003.**